**EMMANUEL E. OKWUOSA & 26 ORS.**

**v.**

**THE OWNERS OF AND OTHER PERSONS INTERESTED IN THE SHIP "M. V. BRIHOPE" AND HONG LEONG LEASING SDN. BHD. (INTERVENORS)**

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ADMIRALTY-IN-REM 27-2-1994]
13 JANUARY 1995

***MARITIME LAW**: Wages of Master and crew - Determination of priority - Whether intervenors have locus.*

***PRACTICE & PROCEDURE**: Whether summary judgment can made in admiralty suit - Whether order made in one suit can be used to enforce order made in another suit.*

The plaintiffs were the Master and crew of a vessel M.V. 'Brihope' (the vessel) who had obtained an order for sale of the vessel by the Court Sheriff to satisfy the plaintiffs' claim for payment of their wages. The said vessel was sold for RM1.44 million and released to the successful tenderer.

The intervenors were the mortgagees of the said vessel which was the security for the two loans advanced to the defendants. The intervenors had also filed a motion for the sale of the said vessel *pendente lite* after the plaintiffs had obtained the order for sale by summary judgment. The plaintiffs motion for the determination of the priority of payment to the several claimants was opposed by the intervenors on the grounds that:

i) the Master and crew are not entitled to wages after 31 March 1994, the date the said order for sale was made; and

ii) the Court should not hear the motion to determine priority.

**Held:**

**[1]** The Master and crew wages for the period after 31 March 1994 though not expressly stated in the order for sale could yet be validly included in the final quatum of their claim by virtue of s. 122(c) of the Merchant Shipping Ordinance 1952 and considering the fact that the computation of the wages was made on the same continuing basis as in the order for sale. It is obvious that until the sale of the vessel and final settlement of their wages the plaintiffs would be in no position to quantify the amount due to them. Furthermore the issue of a writ claiming wages and other moneys due did not have the effect of putting an end to the contract of service, with the consequence that wages continued to accrue after the issue of the writ.

**[2]** The intervenors could not gain on priority even had they beaten the plaintiffs to an order for sale as it is settled law that the Master and crew of a ship carries with him at all times a maritime lien for their wages against the ship that they serve and when that ship is sold at the instance of whichever party, the claim of the crew and Master for wages would, in any event, rank in priority over the claims of the mortgagees, the cargo owners and the defendants. The mortgagee's right in the event of sale of a vessel is only limited to partaking in the proceeds of sale according to the well settled order of priorities of distribution.

**[3]** The defendants have not paid the wages and provisions of the plaintiffs for months and showed no intention of doing so even after the arrest and the commencement of the action. In the circumstances, it became necessary and expedient to make an order for sale and any further delay would only deteriorate the condition of M.V. 'Brihope' and reduce the sale price. Though the plaintiffs could have applied for an order for sale in an admiralty action by way of motion, it does not prohibit them from praying for such an order at the same time within their application for summary judgment since "the order for sale will usually be made part of the decree at the hearing" instead of applying for the same separately.

**[4]** The procedure adopted by the plaintiffs here does not run foul of the Rules of the High Court. Here, admiralty cases occur only rarely and far between, and we do not have, nor is it justified for us to have an Admiralty Court, governed by specific procedures and rules for admiralty proceedings. As such, it is impractical and unrealistic for Malaysian Courts to be too strict on the procedures employed by the parties in admiralty cases. Such procedures should be dictated according to the justice of the situation prevailing in our country.

**[5]** The present case concerns a judicial sale after the merits of the case have been heard and a final judgment obtained, and it is not a sale *pendente lite*. M.V. 'Brihope' had been arrested by the plaintiffs in Admiralty-in-Rem 1 in the Port of Penang since 26 March 1994. Further, the plaintiff had also caveated against release of the said arrest, and as the result of this caveat the vessel was legally and continuously from 26 March 1994 until its sale and handing over on 24 November 1994, under arrest and in the custody of the Court. Furthermore, there is ample provision in O. 70 r. 21(i) of the RHC to allow any party who has obtained or obtains judgment against a ship in an action *in rem* to apply to the Court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship.

*[Orders accordingly].*

**Cases referred to:**
*Vogiatzis and Ors v. Owners of Steamship Fairport [1966] 2 All ER 1026* ***(foll)***
*Jacobs v. Booth's Distillery Co. [1901], 85 LT 262, HL* ***(refd)***
*The "August 8th"; The August 8th Owners v. Costas Bachas [1983] 1 MLJ 281, PC* ***(foll)***
*The Lord Strathcona [1925] Probate Division p. 143* ***(foll)***
*The "Minerva" [1825] 1 Hagg. 347* ***(cit)***
*The "Juliana", [1822] 2 Dods. 504* ***(cit)***

**Legislation referred to:**
Rules of the High Court O. 14 r. 3, O. 29 r. 4 & O. 70 r. 21
Rules of the Supreme Court 1979, O. 14 r. (2)(c) & r. 1 O. 18 r. 19 (UK)
The Merchant Shipping Ordinance 1952, s. 113(1), 118(i), 122(c), 135(1) & 145(1)
Supreme Court Act 1981, s. 21(6) (UK)

**Other sources referred to:**
*Halsbury's Laws of England* (4th Edn.) Vol. 1 p. 233, para. 338 and p. 287, para. 453.
*Admiralty Jurisdiction and Practice* by Nigel Messon pp. 71 & 74
*Enforcement of Maritime Claims* by D.C. Jackson p. 374
*The Supreme Court Practice* 1982 and 1993 para. 29/4/1

*For the plaintiff - Bernard Kok; M/s. Ban Eng. Anual & Foong*
*For the defendants - Gideon Tan; M/s. Lee Hishammuddin*
*For the Intervenors - Felix Dorairaj; M/s. Nahappan, Dorairaj & Danker*
*For the Caveators - Christina Siew; M/s. Shearn Delamore & Co.*

**JUDGMENT**

**Vincent Ng Kim Khoay J:**

This is the plaintiffs' application by notice of motion (the said motion) dated 24 November 1994 (Encl. 69) for an order for the determination of the priority of payments to the several claimants against the funds deposited into Court from the proceeds of sale of a vessel M.V. 'Brihope' (the vessel) under the above Admiralty-in-Rem No. 27-2-1994 (Admiralty-in-Rem 2) and for the payment out of the amounts found due to the various claimants, and for costs.

The plaintiffs were the Master and crew of the said vessel who had obtained an order (Encl. 19) from Dato' Azmel Haji Maamor J on 7 June 1994 for sale of the vessel (the said Order for Sale) by the Court Sheriff to satisfy the plaintiffs' claim. And the said vessel was sold for RM1.44 million and released to the successful tenderer on 24 November 1994. On 29 November 1994 at about 7.00 p.m. the Master and the crew were signed off from the said vessel. There is a pending appeal by the defendants to the Federal Court against this Order for Sale.

The intervenors were the mortgagees of the said vessel which was the security for the two loans advanced to the defendants. They had applied to set aside the said Order for Sale and Dato' Azmel J dismissed the application on 12 August 1994. There is also a pending appeal against this decision by the intervenors/mortgagees to the Court of Appeal. It was common ground that if the plaintiffs had not secured the order for sale the intervenors themselves would have secured such an order for sale. Indeed, the records show that the intervenors had also filed a motion (Encl. 73) dated 8 August 1994 in Admiralty-in-Rem No. 27-1-94 (Admiralty-in-Rem 1) for the sale of the said vessel *pendente lite* after Encl. 19 was obtained, and they themselves had suggested (accepted by the Court) a shipbroker for the sale. Apparently, they were unhappy with Encl. 19 as they had intended to secure an order for sale on terms which they had hoped would favour them on priorities in the distribution of the proceeds of sale.

The caveators, namely, Lam Guan Chan (M) Sdn Bhd, Lam Guan Chan (S) Pte Ltd (the plaintiffs in Admiralty-in-Rem 1 and Continental Enterprise Ltd who were the plaintiffs in Admiralty-in-Rem No. 27-3-94 (Admiralty-in-Rem 3) had respectively caveated against the release of the vessel as owners of certain cargo laden on board the vessel which the defendants had failed to deliver.

The proceedings that resulted in the said Order for Sale was caused by the defendants' inability or refusal to pay the wages of the Master and the crew of the said vessel. I understand that the intervenors have now filed applications before another High Court to set aside and/or vary the Orders dated 16 April 1994 and 18 May 1994 obtained in Admiralty-in-Rem 1 and the Order dated 28 June 1994 in Admiralty-in-Rem 3 in respect of the expenses for discharging the cargo, which is to be heard on 20 January 1995. In my opinion, an appeal against the decision in that pending case appears likely, even if groundless. Now, there is this appeal against my decision on Encl. 69. As such, there would be three pending appeals and a further envisaged appeal caught within the tattered sails of this unfortunate vessel.

I have taken pains to promptly prepare and complete my written judgment to enable speedy resolution of the several pending appeals. The reason being that when Encl. 69 was heard (on 12 December 1994) the crew members were under a second extension (up to 14 December 1994) to remain in Malaysia. They were unable to finance their own transportation back to their country of origin due to not being paid their wages by the defendants for a substantial period of time. Indeed, some of the crew members who are Indonesians and who have been granted a short extension of stay by the Immigration Authorities have been sleeping in the

corridors of the Marine Police base in Penang under the anxious but tired eyes of the Immigration Authorities. The Immigration Authorities had already granted them three extensions for their continued stay here and may not be inclined to grant them any other further extension. Being thus keenly aware of the urgency of the matter, I have written this short judgment without a minute's delay, so to say.

The noteworthy factors governing the hearing of Encl. 69 are:

(1) The caveators had supported *in toto* the application of the plaintiffs.

(2) The defendants had consented to the setting of the priorities of payments but only objected to the payments under the second limb of Encl. 69.

(3) From the intervenors, there was no serious objection on the priority of payment set by me on 12 December 1994 on the said motion except that they had raised only two questions:

(a) They disputed the quantum payable to the plaintiffs, being that the plaintiffs' wages accrued after 31 March 1994 should not be allowed, as Encl. 19 itself only covered their accrued wages up to 31 March 1994. The Master and crew had claimed wages due up to the day after handing over of the said vessel to the successful bidder on 24 November 1994. It was further contended that the Articles, being the contract of employment between the shipowner and crew had expired on 31 March 1994 and as such the wages accruing after that date should come under assessment of damages which was payable only after discharge of the priority of distribution due to the intervenors/ mortgagees.

(b) They submitted that the motion to determine priority in Encl. 69 ought not to be heard by this Court for the reasons detailed later in my judgment.

I held that the intervenors/mortgagees contention in (a) above is without merit and is untenable. In my view, the Master and crew wages for the period after 31 March 1994 though not expressly stated in Encl. 19 could yet be validly included in the final quantum of their claim by virtue of s. 122(c) of The Merchant Shipping Ordinance 1952 (the Ordinance) and considering the fact that the computation of the wages was made on the same continuing basis as in Encl. 19. It is obvious that until the sale of the vessel and final settlement of their wages the plaintiffs would be in no position to quantify the amounts due to them.

Section 122(c) provides-

> In the case of foreign-going ships, other than ships employed on voyages for which seamen by the terms of their agreement are wholly compensated by a share in the profits of the adventure,-
>
> (a) .....
>
> (b) .....
>
> (c) in the event of the **seaman's wages or any part thereof** not being paid or settled as in this section mentioned, then, **unless the delay is due to the act or default of the seaman**, or to any other reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages **shall continue to run and be payable until the time of the final settlement thereof.**
> (Emphasis supplied)

Furthermore, the issue of a writ claiming only wages and other moneys due did not have the effect of putting an end to the contract of service, with the consequence that wages continued

to accrue after the issue of the writ. See *Vogiatzis and Ors. v. Owners of Steamship Fairport* [1966] 2 All ER 1026.

In our current case, the said vessel was a Malaysian registered ship and there was no Port Officer to discharge them. The crew had come into Malaysia under seamen permit from the Malaysian Immigration. Under s. 113(1) of the Ordinance, they have to be discharged and under s. 118(1), their wages have to be paid in the presence of a Port Officer. Indeed, not only was there nobody to discharge them but the intervenors had contested their claim every inch of the way and eventually also caveated against the release or payment out of the proceeds of sale (see Encl. 72). Meanwhile, the crew and the vessel had to be maintained from monies advanced to the Court Sheriff by the caveators.

Furthermore, because they are mortgagees and not employers of the plaintiffs, with privy to the terms and conditions of employment, I am not satisfied as to the *locus standi* of the intervenors to raise this issue on the plaintiffs' salary claims.

In this regard, in the English case of *The Lord Strathcona* [1925] Probate Division p. 143, Hill J had this to say (at p.150):

> What right have the intervenors to raise this contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what *locus standi* they have to dispute the validity of the plaintiffs' mortgages.....As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reason of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is whether the interveners are entitled at all, or on the facts of this case, to limit that plaintiffs' right to procure a sale by the Court. They cannot question the judgment *in rem*. Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale?

It is also trite law that every seaman has a maritime lien on his wages over the vessel he serves. See *Halsbury's Laws of England* (4th Edition) Vol. 1 p. 233 para. 338 and p. 287 para. 453. See also s. 145(1) and s. 134 of the Ordinance. Section 145 of the Ordinance further provides that the Master of a ship has the same rights, liens and remedies for the recovery of wages as a seaman has under the Ordinance or by any law or custom. Furthermore, a seaman not only has a maritime lien on his wages over the vessel he serves but by virtue of s. 135(1) of the Ordinance, such lien is not capable of being renounced or abandoned by any agreement. Indeed, under s. 136 of the Ordinance every seaman shall be entitled to demand and recover wages notwithstanding that the ship in which he has served has not earned freight.

By allegory: the maritime lien of the crew's wages attaches to the ship that they serve *a la* certain oysters to rocks. The reason being that the Court has always adopted a benevolent and protective attitude towards seamen to avoid overreaching by shipowners. In *The "Minerva"* [1825] 1 Hagg. 347 Lord Stowell described the disparity of bargaining power in the negotiation of special contracts in the following memorable words:

> On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side, is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.

The regard which the Admiralty Court has for the intellect of seamen is also illustrated by the words of Lord Stowell in another case, *The "Juliana"* [1822] 2 Dods. 504 where he said: ".... the common mariner is easy and careless, illiterate and unthinking; he has no resources, in his own intelligence and experience in habits of business..."

Section 21(3) and (4) of the United Kingdom Supreme Court Act 1981 states that an action *in rem* may be brought in the High Court against the ship to satisfy the Master and seamen's wages based on their maritime lien on the ship that they serve. Such maritime lien can be enforced by an action *in rem* against a ship irrespective of its ownership. (See *Admiralty Jurisdiction and Practice* by Nigel Meeson pp. 71 and 74). Hence I hold that the current admiralty action was clearly an action *in rem* brought against the vessel - a *fortiori*, as the owners of the vessel were also the persons liable for the plaintiffs' wages.

I cannot see how the intervenors could gain on priority even had they beaten the plaintiffs' to an order for sale, as it is settled law that the Master and crew of a ship carries with him at all times a maritime lien for their wages against the ship that they serve and when that ship is sold at the instance of whichever party, the claim of the crew and Master for wages would, in any event, rank in priority over the claims of the mortgagees, the cargo owners and the defendants. The mortgagee's right in the event of sale of a vessel is only limited to partaking in the proceeds of sale according to the well settled order of priorities of distribution.

I shall now turn to the intervenors' second contention that this motion to determine priority ought not to be heard by this Court as:

(i) the judgment (in Encl. 19), for being a judgment obtained by summons under O. 14 of the Rules of the High Court (RHC) rather than by motion for judgment, was a judgment *in personam* and therefore the sale conducted by virtue thereof must necessarily be *in personam*; and

(ii) the said vessel was at the material time of the sale not under arrest in Admiralty-in-Rem 2 though it was then under arrest in Admiralty-in-Rem 1.

*On contention (i) above:*

A judgment *in rem* e.g. of admiralty Court establishing lien may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. Apart from the application of the term to persons, **it must affect the "res"** in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.

The plaintiffs had applied for summary judgment against the defendants (under O. 14 r. 3 of RHC) in their prayer (a) of encl. 7 and for sale of the defendant's vessel (under O. 29 r. 4 of RHC) in their prayer (c) of the same enclosure which resulted in the order under Encl. 19 being made. The intervenors objection here is based on the procedure applicable in English Courts after 1979, where the following prevails:

It is not possible to make an application for summary judgment under O. 14 of the English Rules of Supreme Court in an Admiralty action *in rem*. However, it is possible to obtain summary judgment *in personam* where there has been an acknowledgement of service in an Admiralty action *in rem*, because after acknowledgment of service the action proceeds also *in personam*. Once summary judgment *in personam* has been obtained, it ought then be possible to apply by motion for judgment *in rem* in default of defence. The Court having held that there is no defence *in personam*, it is difficult to imagine circumstances in which

there could be a defence *in rem*. If a defence is served after summary judgment had been given *in personam*, an application could be made to have such a defence struck out under the English RSC O. 18, r. 19, or under the inherent jurisdiction of the Court.

Cases that held that application for summary judgment is not available for Admiralty actions must be read with caution as the United Kingdom Rules of the Supreme Court and the Singapore Rules of the Supreme Court have been amended several times in this respect. Thus, the law prevailing in the English Courts before the amendment in 1979 is consistent with the views - which I would wholly associate with - that was expressed by Halsbury LC in *Jacobs v. Booth's Distillery Co.* [1901], 85 LT 262, HL, who had this to say:

> People do not seem to understand that the effect of O. 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a Court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

Closer home, the currently prevailing law is, as lucidly expressed by Lord Brandon, who delivered the judgment of the Privy Council in the celebrated case of *The "August 8TH"; The "August 8th Owners v. Costas Bachas* [1983] 1 MLJ 281, PC. His Lordship had this to say (at p. 283):

> The sole question with which their Lordships are concerned in this appeal, as was the Court of Appeal in Singapore in the appeal to it from the order of Choor Singh J, is one of jurisdiction and it is this: by the law of Singapore, is a plaintiff in an admiralty action *in rem* brought by him in the High Court entitled, after he has served a statement of claim on the owners of the property proceeded against and they have entered an appearance in the action, to avail himself of the provisions of O. 14 of the Rules of the Supreme Court 1970, in order to obtain, if he can, a summary judgment against such owners?"

And further down the page he said:

> It has not been suggested, and could not sensibly be suggested, that the Master's action in the present case, being an Admiralty action *in rem* in respect of pecuniary claims included in the Admiralty jurisdiction of the High Court, falls within any of the exceptions contained in sub-paragraphs (a) and (b) of para. (2), or in para. (3) of r. 1 of O. 14 referred to above. That being so, it appears to their Lordships to be clear beyond doubt that, on the true construction of O. 14 of the Rules of the Supreme Court, 1970, an Admiralty action *in rem* such as that brought by the Master in the present case, as well as an Admiralty action *in personam*, is a kind of action in which a plaintiff is entitled to avail himself of the provisions of O. 14, and in which the Court, if satisfied with regard to the merits of the case, has power to give him a summary judgment under that Order.

Order 14 r. (2)(c) United Kingdom Rules of the Supreme Court 1979 clearly excludes application for summary judgment in an Admiralty action *in rem* whereas O. 14 r. 1 of the Singapore Rules of the Supreme Court 1970 which is in *pari materia* with the Rules of the High Court 1980 has no such provision. Hence, the Privy Council decision in *The August 8th* (*supra*) that O. 14 procedure is applicable in an Admiralty action *in rem*, was based on the construction of the provision in the Singapore Rules of the Supreme Court 1970 in the spirit of the dictum in *Jacobs v. Booth's Distillery Co.* (*supra*).

Furthermore, the 1st plaintiff, as Master of the vessel was legally entitled to prepare the salary account of all the plaintiffs including himself and as agent for the defendants in his

capacity as Master, such accounts are binding on the defendants. In the circumstances there could not be any valid triable issues raised on this score in respect of the plaintiffs' O. 14 application.

It is clear from s. 21(6) of the United Kingdom Act that the High Court in exercising its Admiralty jurisdiction may order any ship to be sold. Here, in any action, a Court is clothed with general overriding power under order 29 r. 4 of RHC, to order the sale of property (the subject of the claim) which is of a perishable nature or likely to deteriorate if kept or in relation to which there is good reason for sale. The defendants have not paid the wages and provisions of the plaintiffs for months and showed no intention of doing so even after the arrest and the commencement of this action. In the circumstances, it became necessary and expedient to make an order for sale and any further delay would only deteriorate the condition of M.V. "Brihope" and reduce the sale price. Though the plaintiffs could have applied for an Order for Sale in an Admiralty action by way of motion, it does not prohibit them from praying for such an order at the same time with their application for summary judgment since "the order for sale will usually be made a part of the decree at the hearing" instead of applying for the same separately: see para. 460 of Vol. 1(1) of *Halsbury's Laws of England* (4th Edn. Reissue).

In the work, *Enforcement of Maritime Claims* by D.C. Jackson its author had expressed the following view (at p. 374) on the import of O. 29 r. 4 of the English Rules (which is in *para materia* with our O. 29 r. 4): "A sale to be made [O. 75 r. 23] is confined to property that must be under arrest but it would seem that sale under O. 29 r. 4 is available in all Admiralty actions and indeed, the power to order sale pending suit stems from O. 29 r. 4." The author seems to suggest that it is not a condition precedent for the Court to order sale of the ship that the ship must be under arrest by seeking recourse to O. 29 r. 4. It is even suggested further that O. 29 r. 4 "is applicable to Admiralty actions *in personam* and could apply to Admiralty actions *in rem* where no property is under arrest" (see para. 29/4/1 in the *Supreme Court Practice* 1982 and 1993).

Hence, my view is that the procedure adopted by the plaintiffs here does not run foul of the RHC. Here, admiralty cases occur only rarely and far between, and we do not have, nor is it justified for us to have an Admiralty Court, governed by specific procedures and rules for admiralty proceedings. Indeed, in England they have an autonomous body headed by an Admiralty Marshal, who has his own funds to administer the mechanics of a sale under the Admiralty Division. I am given to understand that Admiralty Division cases there are disposed of so speedily that parties need not have recourse to O. 14 procedure. As such, it is impractical and unrealistic for Malaysian Courts to be too strict on the procedure employed by the parties in admiralty cases. Such procedures should be dictated according to the justice of the situation prevailing in our country.

*On contention (ii) above:*

In support of this contention Counsel for the intervenors had cited the views expressed in the book *Admiralty Jurisdiction and Practice*, Lloyd's of London Press Ltd. 1993, in which its author Mr. Nigel Meeson (at p. 145, under caption 'Application for Appraisement and Sale Pendente lite'), had this to say: "In order to obtain an order for appraisement and sale the vessel has to be in the hands of the Court, even if the application for such sale is made by her owners. The property has to be under arrest in the action in which it is to be sold, and therefore if the property is under arrest in some other action it should be arrested again in the action in which the application is made, and the costs of the arrest will be allowed on taxation in such circumstances."

It is clear, from my careful reading of the author's views therein and the authorities, that an arrest of the vessel prior to application to obtain an order for appraisement and sale, is primarily for the practical purpose of obtaining security for the satisfaction of any judgment that is eventually obtained in a sale *pendente lite* and, for the purpose of establishing jurisdiction, where the shipowners are domiciled in a contracting state under the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. The present case concerns a judicial sale after the merits of the case have been heard and a final judgment obtained, and it is not a sale *pendente lite*. Be it noted that M.V. "Brihope" had been arrested by the plaintiffs in Admiralty-In-Rem 1 in the Port of Penang since 26 March 1994. Further, the plaintiffs had also caveated against release of the said arrest, and as the result of this caveat the vessel was legally and continuously, from 26 March 1994 until its sale and handing over on 14 November 1994, under arrest and in the custody of the Court.

Furthermore, there is ample provision in O. 70 r. 21(i) of the RHC to allow any party who has obtained or obtains judgment against a ship in an action *in rem* to apply to the Court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship.

For all the above reasons the intervenors' second objection (as per (b) above) that this motion is not properly before the Court, is without merits and again fails. In any event this ground is also one of the grounds of the pending appeal to the Court of Appeal against encl. 19.

The defendants' objections concerning payment out could properly only be raised in their application for stay of execution (Encl. 85) pending their appeal. In the afternoon, soon after disposal of Encl. 69 (heard in the morning of 12 December 1994). I heard and dismissed the defendants' application for stay, together with a similar application by the intervenors under Encl. 75.

Issue was not taken by any party on the question of priorities of distribution *per se* of the proceeds of the sale. The reason being that although the determination of priorities is an equitable jurisdiction, and in theory the Court exercise its discretion afresh in circumstances of each case, in practice, the Court follows the well-settled order of priorities unless there are any particular circumstances where justice requires it to disturb that *prima facie* order of priorities. According to the English practice, the following are the *prima facie* order of priorities of distribution of the proceeds of sale:

1) The Admiralty Marshal's charges and expenses are a first charge on the proceeds of sale and will be paid out in priority to any other claim. These will include the expenses he incurred in effecting the arrest, in maintaining the arrest, for example port dues, the cost of a shipkeeper and any supplies required to maintain the ship whilst under arrest, and any other expenses authorised by the Court to enable the ship to be sold for the best possible price.

2) After the expenses of the Admiralty Marshal have been satisfied, priority is granted to the original arresting party in respect of the costs of his action up to and including the arrest, and the costs of the party who obtained the order for appraisement and sale, up to and including the order for appraisement and sale. Of course this will in many cases be one and the same party.

3) A claim with a maritime lien ranks first and has priority over all other types of claim. However, the maritime lien attaches to the ship in connection with which the claim arose

and so where the claim is enforced by means of the sister ship provision, the claim will not be to enforce a maritime lien, but will be only a statutory right of action *in rem* and will have the lesser priority accorded such claims.

4) The claim of a mortgagee is postponed to a claim with a maritime lien whether arising before or after the mortgage, and will also be subject to any claim secured by the issue of an Admiralty writ *in rem* issued prior to the date of the mortgage even if such claim does not carry a maritime lien.

5) The claim of others entitled to proceed by Admiralty action *in rem* will be subject to all maritime liens and mortgages, but will have priority over general creditors of the shipowner, except those who have perfected their execution prior to the issue of the writ *in rem.*

6) The claims *in personam* of creditors of the owner of the res will be last, having no priority.

7) The owner of the res is entitled to the balance remaining, if any.

The intervenors had also contended that the Sheriff's expenses in Admiralty-in Rem 1 are claimable but not Sheriff's expenses and Court commission in respect of Admiralty-in-Rem 2. This is again untenable as it would mean that the Sheriff of the Court may have to bear the expenses and then proceed *in personam* against the defendants (an exercise in futility) since, in their view, she would have no claim *in rem* against the proceeds of sale of the vessel. It stands to reason that as it was the said vessel that was sold by the Sheriff pursuant to a Court order her expenses ought rightly be recoverable against the proceeds of sale of the very subject matter that she had sold.

The common ground here among all the parties is that the vessel had to be sold, and thus the Court Sheriff had to organise the sale, in any event, as directed by the Court. The Sheriff merely gave an account of expenses, a major portion of which were advanced to her by the two caveators, and a minor portion, even by the intervenors themselves. As such, I do not think there should be any objection to the Sheriff now coming to the Court to claim the expenses, irrespective of whether the judgment obtained was *in personam* or *in rem*.

It is also noted that the conduct of the intervenors was, in my opinion, deplorable. The Court allowed retender in the sale of the said vessel upon certain terms and conditions including an undertaking by the intervenors to bear all costs and expenses including provision for maintaining the ship from 22 September 1994 onwards. Indeed under encl. 48 the intervenors had attempted to vary the undertaking. However, neither the undertaking was signed by the Intervenors nor the draft order by their Counsel Mr. Felix.

In the event, and upon the grounds adumbrated above, I allowed with costs the plaintiffs' application in terms of encl. 69, and ordered payment out of the proceeds of sale of the said vessel in the following priorities and amounts:

1) The Court commission RM36,025.

2) Sheriff's expenses being:

   a) Commission to be paid by Sheriff to shipbroker amounting to RM31,800.

   b) Moneys advanced by the caveators under Admiralty-in-Rem 1 to Sheriff as Sheriff's expenses amounting to RM125,000 and further RM40,000. (RM35,000 to crew for discharge of cargo on board and RM5,000 on the valuation report - both amounts in

respect of Admiralty-in-Rem 1. A sum of RM41,370 paid in Admiralty-in-Rem 3 by M/s. Shearn Delamore on behalf of the caveators in Admiralty-in-Rem 2. (Plaintiff in Admiralty-in-Rem 3.) for the discharging agent, and another RM35,000 to the crew pursuant to order of Court dated 28 June 1994. A sum of RM39,066.44 to be deducted from the proceeds of sale by the Court Sheriff (still owing to creditors) in respect of Sheriff's expenses. And, generally, all expenses and Court's commission as per Lampiran 86, including the sum of RM19,710 advanced by the intervenors, who shall also be at liberty to include further expenses in respect of Admiralty-in-Rem 2 within 2 days from date hereof.

3) The costs for the arresting parties namely the plaintiffs in Admiralty-in-Rem 1 first and the plaintiffs' cost in this action second. Thereafter the Sheriff's costs in Encl. 55.

4) The wages for the Master and crew.

i) On the judgment sum RM468,380 as at 31 March 1994 with 8% interest thereon (encl. 19) and from 1 April 1994 to 25 November 1994.

ii) The wages accrued from 1 April 1994 to 25 November 1994 amounting to RM289,106.08.

5) The amount due under the mortgage.

6) The damages for the caveators (the plaintiffs in Admiralty-in-Rem 1 and 3).

As item 3 and part of item 2 has not been quantified the Sheriff is to set aside a sum of RM150,000 to cover future claims under those parts.